MOTION FILED

MAR 26 1975

In the Supreme Court of the United States

OCTOBER TERM, 1974

Nos. 74-878 and 74-879

THE NATIONAL LEAGUE OF CITIES, ET AL.,
Appellants,

vs.

PETER J. BRENNAN, SECRETARY OF LABOR.

THE STATE OF CALIFORNIA, ET AL.,
Appellants,

vs.

PETER J. BRENNAN, SECRETARY OF LABOR.

ON CONSOLIDATED APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION OF THE FLORIDA POLICE BENEVOLENT ASSOCIATION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN RESPONSE TO PETITIONS NOS. 74-878 AND 74-879, AND BRIEF AMICUS CURIAE IN SUPPORT OF PETER J. BRENNAN

BENJAMIN R. PATTERSON
and
HARRY LEWIS MICHAELS
Attorneys for The Florida Police Benevolent Association

2007 Apalachee Parkway
Tallahassee, Florida 32301
Telephone: (904) 878-2113

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-3030

INDEX

Motion 1
Brief 4
Questions Presented 4
Constitutional Provisions and Statutes Involved 4
Interest of Amicus Curiae 5
Argument 5
Conclusion 12

Citations

CASES

Case v. *Bowles*, 327 U.S. 92 (1946) 8, 9, 11
Everard's Breweries v. *Day*, 265 U.S. 545 (1924) 8
Fernandez v. *Wiener*, 326 U.S. 340 (1945) 8
Gordon v. *United States*, 117 U.S. Appendix 697 (1864) 8
Lottery Case (*Champion* v. *Ames*), 188 U.S. 321 (1903) 8
Martin v. *Hunter's Lessee*, 1 Wheat. 304 (1816) 7
Maryland v. *Wirtz*, 392 U.S. 183 (1968) 9
McCulloch v. *Maryland*, 4 Wheat. 316 (1819) 7-8
Northern Securities Co. v. *United States*, 193 U.S. 197 (1904) 8
Sanitary District of Chicago v. *United States*, 266 U.S. 405 (1925) 9
Sperry v. *Florida*, 373 U.S. 379 (1963) 9
United States v. *Darby*, 312 U.S. 100 (1941) 7, 8, 10
United States v. *Oregon*, 366 U.S. 643 (1961) 9
United States v. *Sprague*, 282 U.S. 716 (1931) 8

UNITED STATES CONSTITUTION

Article I, Section 8 ..... 4, 8
Article VI, Clause 2 ..... 5, 11
Tenth Amendment ..... *passim*

UNITED STATES STATUTES

Fair Labor Standards Act of 1938, 29 U.S.C. 201, et seq. 2
Fair Labor Standards Act Amendments of 1974 (Pub. L. 93-259, 88 Stat. 55) ..... *passim*
Rules of the Supreme Court of the United States, Rule 42 2

TEXTS AND TREATISES

I Annals of Congress, 441 7
Cowen, Lindsey, *What Is Left of the Tenth Amendment?* 39 N. C. L. Rev. 154 (Jan. 1961) 11

In the Supreme Court of the United States

OCTOBER TERM, 1974

Nos. 74-878 and 74-879

THE NATIONAL LEAGUE OF CITIES, ET AL.,
Appellants,
vs.
PETER J. BRENNAN, SECRETARY OF LABOR.

THE STATE OF CALIFORNIA, ET AL.,
Appellants,
vs.
PETER J. BRENNAN, SECRETARY OF LABOR.

ON CONSOLIDATED APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION OF THE FLORIDA POLICE BENEVOLENT ASSOCIATION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN RESPONSE TO PETITIONS NOS. 74-878 AND 74-879

The Florida Police Benevolent Association (Fla. P.B.A.) hereby respectfully moves for leave to file a brief amicus curiae in this case in support of the appellee, as

provided in Rule 42 of the Rules of the Court. The consent of the attorneys for the appellant State of California has been obtained, as has the consent of the attorneys for the appellee. The consent of the attorneys for the appellant National League of Cities was requested, but refused.

The Florida Police Benevolent Association is primarily an organization of law enforcement personnel in the State of Florida with a membership of approximately five thousand. The basic issue posed by the case is of the deepest concern to the Fla. P.B.A. and all other municipal, county and state law enforcement personnel. That issue is the constitutionality of the 1974 amendments to the Fair Labor Standards Act of 1938 (P.L. 93-259, 88 Stat. 55, amending 29 U.S.C. 201, et seq.), which include a provision dealing with compensation for overtime, applicable to certain law enforcement personnel. Accordingly, as the spokesman for one group of municipal, county and state law enforcement personnel, whose interests are similar to many other such law enforcement personnel across the country who will be affected by the outcome of this decision, the Fla. P.B.A. desires the opportunity to present its views on this matter to the Court.

Movants will necessarily concentrate on the peculiar facts of their own case. In the brief tendered with this motion, the Fla. P.B.A. treats the question of the constitutionality of these 1974 amendments to the Fair Labor Standards Act more narrowly than does the Solicitor General. Specifically, we emphasize the Tenth Amendment of the United States Constitution and demonstrate how the amendment should not be allowed to render unconstitutional federal legislation which may compel states, and their political subdivisions, to treat their employees in a fair manner. More specifically, we submit that states should not be able to utilize the Tenth Amendment as

a shield when they are reluctant to provide state-employed law enforcement personnel with state legislation protecting their labor standards, while the federal government is willing to do so through one of its delegated powers under the Constitution.

Hence, we ask leave to place before the Court a statement of our reasons for asserting that the Tenth Amendment arguments made by the petitioners in an attempt to strike these amendments as unconstitutional are a potentially hazardous area for state employees who are not protected on the state level and need protection through federal legislation in order to maintain standards in their respective areas. A brief containing such a presentation is tendered with this motion.

WHEREFORE, it is respectfully prayed that this motion for leave to file the annexed brief amicus curiae be granted.

Respectfully submitted,

HARRY LEWIS MICHAELS

BRIEF AMICUS CURIAE

QUESTIONS PRESENTED

This case presents questions which go to the very heart of this country's constitutional form of government. The issues in this case are requiring this Court to decide whether or not Congress has acted within its delegated powers when it formulated the 1974 amendments to the Fair Labor Standards Act of 1938. The questions presented necessarily include the following:

(1) Whether the Tenth Amendment is in fact a limitation upon the power of Congress to enact legislation pursuant to its constitutionally delegated power to regulate interstate commerce.

(2) Whether in this case the Tenth Amendment would limit the power of Congress to enact the 1974 amendments to the Fair Labor Standards Act of 1938 pursuant to its constitutionally delegated power to regulate interstate commerce.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The relevant parts of the Constitution of the United States are as follows:

Article I, Section 8:

> The Congress shall have Power * * *
>
> * * *
>
> To regulate Commerce * * * among the several States * * *;

Article VI:

> * * *
>
> This Constitution, and the laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land * * *.

Tenth Amendment:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The Fair Labor Standards Amendments of 1974 are set forth as Appendix B to the Jurisdictional Statement of appellants National League of Cities, et al.

INTEREST OF AMICUS CURIAE

The interest of the Florida Police Benevolent Association as amicus curiae is set forth in the Association's motion for leave to file this brief amicus, to which motion this brief is annexed.

ARGUMENT

As stated in the motion for leave to file this brief amicus, the Florida Police Benevolent Association (Fla. P.B.A.) has necessarily taken a more narrow approach to the various questions presented in this cause. Due to the nature of their organization, the Fla. P.B.A. is primarily interested in the provision in the 1974 amendments to the Fair Labor Standards Act which relates to overtime compensation for law enforcement personnel after they have worked a certain number of hours in a prescribed period of time. However, again necessarily, the arguments

presented in this brief apply to the constitutionality of all of the 1974 amendments.

The primary position taken by the Fla. P.B.A. is that the Tenth Amendment of the United States Constitution is not a limitation upon the extent to which the delegated powers of the federal government can be exercised. Although the Tenth Amendment must be scrutinized in conjunction with one of the enumerated powers before it is relevant, the Fla. P.B.A. is of the opinion that a clear and concise delineation of the role of the Tenth Amendment in cases involving constitutional questions previously before this Court will be helpful in the disposition of the consolidated case now before the Court.

In essence, the Fla. P.B.A. takes the position that successful use of Tenth Amendment arguments by states or their political subdivisions, in cases where the federal government has seen the need to act under one of its delegated powers from the Constitution of the United States, would result in a deprivation of protective legislation which the federal government is constitutionally permitted to enact.

I. The Tenth Amendment

The Tenth Amendment, as adopted in 1791, provides as follows:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Ever since its proposal by the first Congress and its ratification by the states as part of the Bill of Rights, the Tenth Amendment has never been viewed as a limitation upon the delegated powers of the federal government, but rather as a reiteration of what was already

provided in the Constitution. James Madison, speaking in Congress during the debates which prefaced the Tenth Amendment, said:

> I find, from looking into the amendments proposed by the state conventions, that several are particularly anxious that it should be declared in the Constitution, that the powers not therein delegated should be reserved to the several states. Perhaps other words may define this more precisely than the whole of the instrument now does. I admit they may be deemed unnecessary; but there can be no harm in making such a declaration, if gentlemen will allow that the fact is as stated. I am sure I understand it so, and do therefore propose it.
>
> I Annals of Congress, 441

The initial intention of the Tenth Amendment was quite clearly not meant to be a limitation upon Congress to act within the scope of the powers delegated to the United States by the Constitution. The subsequent decisions of this Court have not modified to any extent the intention of those who drafted this amendment. In *United States* v. *Darby*, 312 U.S. 100, 124 (1941), a case dealing, as this one does, with the constitutionality of the Fair Labor Standards Act of 1938, this Court summarized its view of the Tenth Amendment:

> From the beginning and for many years the amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end.

The Court then cited the following decisions as authority for its view of the Tenth Amendment: *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 324, 325 (1816); *McCul-*

loch v. *Maryland*, 4 Wheat. 316, 405, 406 (1819); *Gordon* v. *United States*, 117 U.S. Appendix 697, 705 (1864); *Lottery Case* (*Champion* v. *Ames*), 188 U.S. 321 (1903); *Northern Securities Co.* v. *United States*, 193 U.S. 197, 344, 345 (1904); *Everard's Breweries* v. *Day*, 265 U.S. 545, 558 (1924); *United States* v. *Sprague*, 282 U.S. 716, 733 (1931).

Since the *Darby* decision in 1941, this Court has consistently construed the Tenth Amendment to be no more than what the Constitution as a whole provides, and as such is not a limitation in any sense upon the delegated powers of the federal government. The Court has maintained this position in cases dealing with the Commerce Clause of the Constitution (Art. I, Sec. 8), as well as in other cases where activity within a state was constitutionally regulated under another power delegated to the federal government, and not in violation of the Tenth Amendment.

In *Fernandez* v. *Wiener*, 326 U.S. 340 (1945), a case dealing with the estate tax on community property, this Court held that the Tenth Amendment did not operate as a limitation upon the powers, express or implied, delegated to the national government. One year later, in *Case* v. *Bowles*, 327 U.S. 92 (1946), a case dealing with the Emergency Price Control Act, the Court faced the constitutional issue of whether Congress had exceeded the scope of its delegated powers in enacting the legislation in question. The Court resolved the issue, in light of the Tenth Amendment, by stating:

> Since the decision in *McCulloch* v. *Maryland* * * * it has seldom if ever been doubted that Congress has power in order to attain a legitimate end—that is, to accomplish the full purpose of a granted authority—to use all appropriate means plainly adapted to that end, unless inconsistent with

> other parts of the constitution. And we have said, that the Tenth Amendment "does not operate as a limitation upon the powers, express or implied, delegated to the national government." [*Case* v. *Bowles*, supra, 327 U.S. at 102.]

More recently, in *United States* v. *Oregon*, 366 U.S. 643 (1961), this Court dealt with the Tenth Amendment question in relation to a federal statute concerning the devolution of property which conflicted with an Oregon statute on the same subject. The Court held that the federal statute prevailed, and stated that:

> Although it is true that this is an area normally left to the states, it is not immune under the Tenth Amendment from laws passed by the Federal Government which are, as is the law here, necessary and proper to the exercise of a delegated power. [*United States* v. *Oregon*, supra, 366 U.S. at 644.]

In *Sperry* v. *Florida*, 373 U.S. 379 (1963), a patent practice case, this Court held that since Congress had acted within its delegated powers, delegated to the United States by the Constitution, it had not exceeded the limits of the Tenth Amendment even though the federal legislation would have concurrent effects upon a matter which would otherwise be within the control of the state.

Finally, in the last case to deal with the constitutionality of amendments to the Fair Labor Standards Act of 1938, this Court, in *Maryland* v. *Wirtz*, 392 U.S. 183 (1968), held that since *Sanitary District of Chicago* v. *United States*, 266 U.S. 405 (1925), there was no longer any question about whether state concerns "outweighed" the importance of a constitutionally valid federal statute under the powers delegated to Congress. They do not.

II. The Commerce Clause

As stated earlier, Tenth Amendment arguments are not based solely upon the Tenth Amendment. There must be an exercise of a power by the federal government which is being questioned by a state as to whether the power is within the scope of those powers delegated to the federal government by the Constitution. In this case, the appellants claim that the 1974 amendments to the Fair Labor Standards Act of 1938 are not within the Commerce Power of the Constitution. The brief submitted by the Solicitor General in support of the appellee Peter J. Brennan, Secretary of Labor, comprehensively and conclusively deals with this aspect of the case. The Fla. P.B.A. asks only that its brief amicus be read in conjunction with the Solicitor General's brief. The questions arising under the Tenth Amendment and the Commerce Clause necessarily dovetail to form the primary issue in this case.

III. Valid Exercise of the Commerce Clause by the Federal Government Precludes Any Tenth Amendment Arguments on the Part of the States

The constitutional question in these consolidated cases involves whether or not the interstate commerce power of Congress has been exceeded by the 1974 amendments to the Fair Labor Standards Act of 1938. This question is not affected by the Tenth Amendment because the Tenth Amendment has consistently been construed as not being a limitation upon any of the powers delegated to the federal government by the Constitution of the United States.

Justice Story enunciated probably the most succinct comment on the Tenth Amendment when he stated that, "The amendment states but a truism that all is retained which has not been surrendered." *United States* v. *Darby*, supra, 312 U.S. at 124. A corollary of this statement

is that those powers which have been surrendered by the states to the federal government are wholly surrendered, and the Tenth Amendment in no way mitigates this fact. This rule holds true even where there is conflicting legislation between the states and the federal government. As pointed out in *Case* v. *Bowles*, supra, there is no general implied doctrine that the national and state governments must exercise their respective powers so as not to interfere with each other. By virtue of the Supremacy Clause of the Constitution (Article VI, Clause 2), valid federal legislation takes precedence over any existing state legislation on the same topic, and also the power of the state to legislate in that particular area subsequent to the federal legislation.

Professor Cowen summarized this exact issue very comprehensively when he stated in *What Is Left of the Tenth Amendment*, 39 N. C. L. Rev. 154, 173 (Jan. 1961):

> By implied prohibition the states are precluded from regulating interstate commerce. Nevertheless they may exercise their normal powers, primarily the police power and the power to tax, until such time as a superior federal power is asserted. Then the state power yields. But this is not an invasion of reserved powers. The powers delegated to the United States are superior to the powers of the states. They are complete and sufficient to achieve the ends for which the Constitution was created. In view of the broadened scope of the commerce power, effected by activity participated in by the executive, legislative and judicial branches of the federal government, it seems safe to predict that the tenth amendment will never again be successfully used to nullify an act of Congress based on the commerce power. [Citations omitted.]

CONCLUSION

The constitutional arguments presented by the appellants, especially their Tenth Amendment argument, have already been examined and discarded by this Court in the cases cited above. The Tenth Amendment of the Constitution of the United States should not be construed to be more than it actually is. The Tenth Amendment was not intended to be and has not been construed as a limitation upon the powers delegated to Congress by the Constitution of the United States, and in this case is not a limitation upon the power of Congress to legislate in the area of interstate commerce. The judgment of the district court should be affirmed.

Respectfully submitted,

BENJAMIN R. PATTERSON

and

HARRY LEWIS MICHAELS

Attorneys for The Florida Police Benevolent Association

March 28, 1975